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No. 93-1999

In The

Supreme Court of the United States

October Term, 1994

PACIFIC GAS AND ELECTRIC COMPANY,

Petitioner,

v.

J.A. SAVAGE,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of California

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Savage was a reporter for Energy User News (EUN) from December 1986 through November 1987. Pacific Gas and Electric Company (PG&E) suspected that Savage was biased against it because she had taken positions PG&E did not like between 1981 and early 1986, regarding its nuclear power facilities. PG&E retaliated against Savage in November 1987, by defaming her to her editors at EUN which resulted in her immediate termination. After her termination Savage wrote as a "stringer" for Journal of Commerce and the Bay Guardian in December 1987. The Public Relations department at PG&E was open to all members of the press. When Savage sought access to PG&E's Public Relations department in December 1987, as a "stringer" for the Journal of Commerce she was barred from access by PG&E based on PG&E's policy of refusing to cooperate with Bay Guardian reporters. The California Court of Appeal held that PG&E's discriminatory conduct against Savage violated California Public Utilities Code section 453, subdivision (a) and the equal protection clause of the California Constitution, Article I, Section 7(a). The questions presented are:

1. Should discretionary review be denied because petitioner has inaccurately set forth the facts in violation of Supreme Court Rule 14.5?

2. Should discretionary review be denied where the petitioner failed to raise the main issue presented here in

QUESTIONS PRESENTED – Continued

the California Court of Appeal and in the California Supreme Court as required by California procedural law?

3. Should discretionary review be denied because the lower court decision was based on independent and adequate state grounds?

4. Is a substantial federal question raised when the California State Courts hold that a California public utilities act of blacklisting a reporter violates the equal protection clause of the California Constitution?

PARTIES

Petitioner, Pacific Gas and Electric Company (PG&E), is a California corporation with its principal place of business in San Francisco, California. Petitioner is an operating public utility which supplies electric service to approximately 4,000,000 electric customers and 3,500,000 gas customers in Northern California.

Respondent, J.A. Savage (Savage), is an individual resident of Oakland, California, and is a residential customer of PG&E electric and gas service.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, J.A. Savage, respectfully requests that this court deny the Petition for Writ of Certiorari submitted by the Petitioner, Pacific Gas and Electric Company.

OPINIONS BELOW

By published opinion, the Court of Appeal, State of California, First Appellate District, Division One (reported at 21 Cal.App.4th 434; 26 Cal.Rptr.2d 305) reversed two trial court orders which granted the petitioner's motion for judgment on the pleadings and petitioner's motion for summary adjudication and reinstated respondent's case for trial. The California Supreme Court

denied Petitioner's Petition for Review without dissent. These two court decisions are reproduced in the appendix to PG&E's Petition for Writ of Certiorari. (Petition.)

JURISDICTION

The Supreme Court of California unanimously denied discretionary review of the published decision of the California Court of Appeal on March 17, 1994. The Court of Appeal decision was decided without dissent on December 27, 1993. Petitioner seeks to invoke this court's discretionary jurisdiction under 28 U.S.C. section 1257. Discretionary jurisdiction should be denied in this case because petitioner failed to raise the issues argued herein in the court below. The court should also decline to invoke discretionary review because the decision of the lower court was correctly decided on Independent and Adequate State Grounds and PG&E's petition raises no new federal question of substance.

STATEMENT OF THE CASE

In January and July 1986, Ms. Savage exercised her rights of freedom of speech and political participation by appearing on these two occasions before the California Public Utility Commission (P.U.C.) on her own time and at her own expense. The hearing she appeared in was a technical hearing regarding the accurate calculation of the cost to ratepayers of the eventual decommissioning of the Diablo Canyon Nuclear Power Plant. Ms. Savage's two 1986 appearances before the P.U.C. were specifically

authorized by Public Utilities Code section 454, California case law and by the California Constitution. PG&E has always conceded that Savage had an absolute right to participate in these hearings, since Savage was a ratepayer in PG&E's service area who would have been directly affected by the outcome of these hearings.

Six months after her participation in the Diablo Canyon case ended she went to work as a reporter for Energy User News (EUN).

In November 1987, Pacific Gas and Electric Company (PG&E) retaliated against Ms. Savage for having effectively exercised her P.U.C. rights in the Diablo Canyon case by having its top executive in its news service department (i.e. the Public Relations Department) defame Ms. Savage to her employer at EUN. Specifically, David Monfried, the Director of Public Relations for PG&E, falsely told her employer that she was secretly a paid employee of a group called the Redwood Alliance that was actively litigating cases against PG&E at the same time she was working for Energy User News reporting on PG&E. PG&E also put these false statements in writing in a follow-up letter to Energy User News. Ms. Savage was promptly discharged for conflict of interest based on these false accusations.

Finding herself out of the full-time position she had at Energy User News, in December 1987, Ms. Savage sought and obtained freelance work as a "stringer" for, inter alia, the Bay Guardian and the Journal of Commerce. When PG&E's Public Relations director learned Ms. Savage was stringing for the Journal of Commerce, Monfried again retaliated. In letters to the Journal of

Commerce, Monfried made it clear that the public relations department, which was open to all other journalists, was off limits to Savage. Monfried told the Journal of Commerce that Savage was persona non grata at PG&E because she had written freelance articles for the Bay Guardian. Once the Journal of Commerce learned that Savage had been barred by PG&E from access to PG&E's Public Relations Department, the Journal of Commerce dropped Ms. Savage as a stringer.

PG&E's retaliation against Savage was not the first time PG&E had interfered with the employment of a journalist whom PG&E suspected had reported unfavorably on one of its nuclear facilities. (See *Widener* v. *PG&E Company* (1977) 75 Cal.App.3d 415.)

A. PG&E's View Of The Facts

The petition for Writ of Certiorari filed by PG&E sets forth in pages 2 through 6 a statement of the case and the lower court decision. Respondent contends that PG&E's statement of the case and its description of the lower court decision are misleading in violation of Rule 14.5 of the Rules of the Supreme Court of the United States.

Respondent agrees that the facts are not in dispute that Mr. Monfried told the Journal of Commerce that Savage was persona non grata and would not be granted access to its public relations department. However, despite petitioner's statement to the contrary the remainder of the facts in this case are in dispute.

To be sure, Savage, the Redwood Alliance and PG&E took different positions before the California P.U.C. as to

the cost of decommissioning PG&E's nuclear facilities and the mechanism for the collection of these costs from ratepayers, one of whom was Savage. But it is an overblown statement to convert the fact that Savage and PG&E took different positions on decommissioning into the accusation that she was an "outspoken opponent of PG&E's nuclear energy production." (Petition, at p.2.)

Nor is it a settled fact in this case that the Bay Guardian was for many years a strident critic of PG&E. (*Ibid.*) These "facts" appear nowhere in the record and, as such, are not before the court.

Throughout its brief, the petitioner also asserts that the lower court decision ordered PG&E executives to cooperate with Savage. This statement is not correct. Missing from PG&E's brief is the nature of who Mr. Monfried was and what department Savage was barred from. Savage was barred from contact with PG&E's public relations department of which Monfried was its director. This department is PG&E's official liaison with members of the media and is open to all members of the media. In a practical sense, the Public Relations department at PG&E is like a floating press conference that members of the media attend when they need to get the utility's position on an issue. It was contact with the public relations department from which Savage was barred. The lower court decision held that under California's constitution and statutes PG&E could not single out Savage and discriminate against her by blacklisting her from PG&E's Public Relations department which is open to all other reporters. Thus, Petitioner has distorted the facts when it claims that the California court decision had forbidden

PG&E executives from declining to cooperate with Savage if she seeks to "publish more articles launching partisan attacks against PG&E." (Petition, at p. 8.)

Finally the linch-pin of the herein petition is PG&E's claim that the lower court opinion held that PG&E was a "state actor" within the meaning of federal case law. (Petition, at p. i, 8, 13.) PG&E has argued that since it was not a "state actor" it was free to engage in discriminatory conduct against any reporter it did not like. PG&E based this argument on the assertion that the lower court decision had concluded that petitioner was a state actor within the meaning of the Fourteenth Amendment. This assumption in the petition is mistaken. On the contrary, the lower court decision held that Fourteenth Amendment "state action" was not required to be present under California's equal protection clause (which contains no such requirement) for PG&E to have violated P.U.C. section 453, subdivision (a). (Petition Appendix 24a-25a.) Thus, contrary to PG&E's central premise, the lower court did not erroneously find that PG&E was a "state actor" within the meaning of the Fourteenth Amendment.

REASONS FOR DENYING THE WRIT

This case presents no novel questions of federal law. The lower court decision, holding that PG&E, the world's largest investor owned utility, violated California P.U.C. section 453, subdivision (a) and the California equal protection clause when it "blacklisted" Savage, was based on independent and adequate state grounds. No substantial federal issue worthy of review is present in this case.

This case is nothing more than PG&E's attempt to rewrite the facts so as to frame a federal issue in order to obtain review in this court. Discretionary review is inappropriate because the central issue of "state action" framed by PG&E was not argued in the courts below and did not play a role in the outcome of the case.

I.

THE CENTRAL ISSUE OF WHETHER PG&E WAS A "STATE ACTOR" WAS NOT RAISED IN THE LOWER COURTS AND, THEREFORE, WAS WAIVED

PG&E does not deny in its petition that if it had been a "state actor" that its conduct would have violated Savage's freedom of press rights. Nor could it have successfully done so given the unbroken line of cases that prohibit such conduct by state actors. (See *Times-Picayune Publishing Corporation* v. *Lee* (U.S.D.C., E.D. LA. 1988) 15 Med.L.Rptr. 1713, 1719; *Quad-City Community News Service, Inc.* v. *Jebens* (U.S.D.C., S.D. Iowa, 1971) 334 F.Supp. 8.)

Instead, PG&E argues that the settled case law cited by the California Court of Appeal did not apply to it because PG&E was not a "state actor." Thus, PG&E reasons that since it was not a "state actor" the Fourteenth Amendment and the federal equal protection clause contained therein did not forbid it from discriminating against Savage. Respondent respectfully submits that the court should not entertain this issue because it was not raised in the courts below.

Rule 14.1(h) of the Rules of the United States Supreme Court requires all petitioners to state in their

statement of the case at what stage in the lower court proceedings the issue they seek to have the court review was timely and properly raised. The court will look in vain for this data in the petitioner's statement of the case.

The linch-pin issue in the petitioner's brief is whether the California Court of Appeal decision erroneously concluded that PG&E was a state actor. This issue was not raised by petitioner at all in the California Court of Appeal.

The alleged "state action" issue that petitioner complains about first appeared in the Court of Appeal decision filed on December 27, 1993. (See Petitioner Appendix 21a-30a.) Because this specific part of the decision had not been briefed by the parties, under California Government code section 68081 petitioner had the right to a rehearing on this issue, if it had simply filed a Petition for Rehearing within 15 days. Petitioner failed to request rehearing. Petitioner's failure to petition for rehearing on the issue of "state action" must be viewed as a waiver of this issue at the California Court of Appeal level.

Nor was this issue raised by petitioner in the California Supreme Court. (See PG&E's statement of issues and its table of contents contained in its brief to the California Supreme Court both of which are attached as respondent's appendix 1A and 1B.) It is settled under California case law that the failure to raise an issue or argument in a party's brief constitutes abandonment or waiver of the issue or argument. (*Henderson* v. *Security National Bank* (1977) 72 Cal.App.3d 764, 769, Petition for Review denied by the California Supreme Court on October 20, 1977; *Younger* v. *State of California* (1982) 137 Cal.App.3d 806,

813; *California Civil Appellate Practice*, second Edition, C.E.B., Review by the California Supreme Court, section 22.4, pp. 594-595; Witkin, *California Procedure*, 3rd.Ed., Vol.9, Appeal, section 479, p. 469.) The first time this issue was ever raised was in the current petition. It is also settled that issues not raised, briefed and argued in the California appellate courts are not properly before the United States Supreme Court and should be dismissed for want of jurisdiction. (*Hill* v. *State of California*, 401 U.S. 797, 805, 28 L.Ed.2d 484, 490, 91 S.Ct. 1106 (1971); *In Cardinale* v. *Louisiana*, 394 U.S. 437, 439, 22 L.Ed.2d 398, 401, 89 S.Ct. 1161 (1969); *Beck* v. *Washington*, 369 U.S. 541, 553, 8 L.Ed.2d 98, 82 S.Ct. 955 (1962).) In the *Beck* case the court explained that waiver of the federal issue raised in that case occurred because the litigant failed to list the specific federal issue among its "assignment of errors" in the brief it filed in the state supreme court or to argue it directly in its brief. (*Beck* v. *Washington*, 369 U.S. 541, 553, 8 L.Ed.2d 98, 82 S.Ct. 955 (1962).)

Inasmuch as petitioner failed to raise or argue the "state action" issue in the California Court of Appeal or the California Supreme Court, discretionary review of this matter must be denied based on waiver.

II.

DISCRETIONARY REVIEW SHOULD BE DENIED BECAUSE THE LOWER COURT FINDING THAT PG&E HAD VIOLATED P.U.C. SECTION 453, SUBDIVISION (A) WAS BASED ON INDEPENDENT AND ADEQUATE STATE GROUNDS

In its petition PG&E claims that the lower court decision was based "solely" upon a United States Constitutional analysis. (Petition, p. 5, fn.2.) The petitioner goes

on to urge that since the lower court's interpretation of federal constitutional law was in error, reversal was required. Respondent submits that review should be denied because the lower court opinion was based on independent and adequate state grounds.

The alleged federal issue petitioner complains about was discussed by the court at Appendix page 21(a) through 30(a). (Petition) The central part of the court's analysis appears in the first four pages of the opinion (Petition, Appendix 21(a) through 24(a).) In the opinion, the lower court made clear that the decision was based on the California case of *Gay Law Students Association* v. *Pacific Telephone and Telegraph Company* (1979) 24 Cal.3d 458, California Constitution Article I, section 7(a), which sets forth the California equal protection clause, and P.U.C. section 453, subdivision (a). The California Court of Appeal also made clear that California's equal protection clause did not require "state action" for a violation of California's equal protection clause to occur. (Petition Appendix 24(a) through 25(a).)

After concluding on the basis of state law that PG&E's conduct could violate California's equal protection clause without the necessity that there be "state action" present, the California Court of Appeal did cite federal cases in which mayors, police chiefs and other government officials had been found to have violated other reporters' freedoms of the press on nearly identical facts. (Petition, Appendix 25(a) through 26(a).) However, the California Court of Appeal did not cite these cases for their Fourteenth Amendment "state action" precedential value. The lower court decision cited these state and federal cases solely because in each of these cases the

courts had found the identical conduct present in the Savage case to be actionable.

While petitioner argues to the contrary, the mere fact the California Court of Appeal cited federal cases for their analogical value in deciding the application of the California Constitution, Article I, section 7(a) to the specific set of facts here, did not convert this case into a federal case ripe for Supreme Court review.

It has long been settled that when a state court decision is based on state law that is both independent and adequate to support the decision, the United States Supreme Court will not review the decision. (*Illinois* v. *Rodriguez*, 497 U.S. 177, 182, 111 L.Ed.2d 148, 157, 110 S.Ct. 2793 (1990).) This is so because "it is a well-established principle of federalism that a state decision resting on an adequate foundation of state substantive law is immune from review in the federal courts." (*Fox Film Corporation* v. *Muller*, 296 U.S. 207, 80 L.Ed. 158, 56 S.Ct. 183 (1935).)

In the context of direct review of a state court judgment (as is the case here), the independent and adequate state ground doctrine is jurisdictional and prevents review whether the state law ground is substantive or procedural. (*Coleman* v. *Thompson*, 501 U.S. ___, 115 L.Ed.2d 640, 655, 111 S.Ct. ___ (1991).)

Of course where the state law decision also discusses federal law, and the adequacy and independence of the state law ground is not clear from the opinion, it will not be assumed that the decision rests on state grounds. (*Michigan* v. *Long*, 463 U.S. 1032, 1041, 77 L.Ed. 2d 1201, 1214, 103 S.Ct. 3469 (1983).)

In the case sub judice, respondent submits that the lower court decision clearly rested on independent and adequate state grounds. The California Court decision expressly held that PG&E's conduct as alleged would violate California P.U.C. section 453, subdivision (a). (Petition Appendix 24(a) and 28(a).) Nearly the entire case analysis was underpinned by the California *Gay Law Students* case which itself was based upon an analysis of California's own equal protection clause which does not contain a Fourteenth Amendment "state action" requirement. (*Gay Law Students Association* v. *Pacific Telephone and Telegraph Company, supra,* 24 Cal.3d 468, 475.) It is true that the lower court decision did cite federal cases for their analogical value. Nevertheless, the crux of the decision was California substantive and constitutional law. As such discretionary review should be denied based on the presence of independent and adequate state grounds which are apparent from the face of the opinion.

III.

DISCRETIONARY REVIEW SHOULD BE DENIED FOR LACK OF A SUBSTANTIAL FEDERAL QUESTION

At the heart of PG&E's petition is the assumption that the lower court opinion held that the utility had engaged in Fourteenth Amendment "state action" when it retaliated against Savage.

Section I of the Fourteenth Amendment to the United States Constitution reads in relevant part that:

> "No *state* shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any *state*

> deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Of course it has long been settled that in order to violate the Fourteenth Amendment, the defendant must have engaged in "state action." (*Jackson* v. *Metropolitan Edison Company*, 419 U.S. 345, 95 S.Ct. 449, 42 L.Ed. 2d 477 (1974).) Reduced to its essence, PG&E's argument is that since it was not a "state actor" when it retaliated against Savage, it cannot be guilty of having violated the federal equal protection clause of the Fourteenth Amendment. Respondent submits that PG&E's argument is specious because it has based its analysis on the wrong equal protection clause.

The lower court opinion concluded that PG&E's conduct violated the California equal protection clause, not the federal equal protection clause. (Petition, Appendix at p. 24(a).) The California equal protection clause, contained in Article I, section 7, subdivision (a) of the California Constitution, simply states that:

> "A person may not be deprived of life, liberty or property without due process of law or denied equal protection of the laws."

"Unlike the due process and equal protection clauses of the Fourteenth Amendment, which by their explicit language operate as restrictions on the actions of states, the California constitutional provision contains no such explicit 'state action' requirement." (*Gay Law Students Association* v. *Pacific Telephone and Telegraph Company*, *supra*, 24 Cal.3d 458, 468.)

Furthermore, under Article 1, section 24 of the California Constitution, rights, such as equal protection, guaranteed by California's constitution are expressly not made dependent on those guaranteed by the United States Constitution.

That is not to say that California courts have applied the California equal protection clause without any regard at all to the "state action" concept. (*Gay Law Students Association* v. *Pacific Telephone and Telegraph Company, supra,* 24 Cal.3d 458, 468.) However, in interpreting its own equal protection clause, California courts are not bound by federal "state action" decisions analyzing the Fourteenth Amendment. (*Id.,* at 469.)

In the lower court opinion the California courts simply concluded that the California equal protection clause, that has no express "state action" requirement, was broad enough to prohibit discriminatory acts by state utilities under P.U.C. section 453 subdivision (a). Thus, under the California Constitution a larger group of entities "affected with a public interest" are covered by the ambit of California's equal protection clause than are covered by the Federal equal protection clause. This interpretation of the California Constitution by the California courts simply did not convert this state constitutional case into a federal case. "It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions." (*Michigan* v. *Long,* 463 U.S. 1032, 103 S. Ct. 3469, 77 L.Ed.2d 1201, 1214-1215 (1983.)

Inasmuch as the lower court opinion only concluded that utility discrimination was unlawful under the California equal protection clause and California P.U.C. section 453 subdivision (a), there is no substantial federal question present in this case worthy of review by this court.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully Submitted,

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APPENDIX 1a

ISSUES FOR REVIEW

The United States Supreme Court has ruled that California public utilities, like other corporations, hold the constitutionally-protected right not to assist in, and associate themselves with, the dissemination of views with which they disagree.

The Court of Appeal has stripped public utilities of this First Amendment right, and in doing so has ignored clear and controlling Supreme Court constitutional jurisprudence. Moreover, the court below has radically expanded the scope of section 453, subdivision (a), of the Public Utilities Code (a statute which on its face requires utilities to deal even-handedly with their customers in matters concerning rates and services), construing it to *require* utilities to "cooperate" with news reporters who attack the utilities in highly partisan and adversarial stories.

A. Did the Court of Appeal err in denying public utilities the First Amendment right not to assist in the dissemination of views which are antithetical to the utilities' strongly-held beliefs?

B. Did the Court of Appeal err in holding that Public Utilities Code section 453, subdivision (a), *requires* public utilities to "cooperate" with adversarial reporters?

C. PG&E told a reporter's employer that it believed the reporter had a conflict of interest. The employer conducted an investigation and independently decided to terminate the reporter. Can PG&E's statements, as a matter of law, be the cause of the reporter's termination?

APPENDIX 1b

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